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SUPREME COURT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 81 5026

RONALD DOUTHIT,

Petitioner,

vs.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-

RONALD DOUTHIT,

Petitioner,

vs.

WALTER D. ZANT, Warden,
Georgia Diagnostic Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

Petitioner, Ronald Douthit, prays that a writ of certiorari be issued to review the judgment of the Superior Court of Butts County, Georgia entered on November 14, 1980. Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia April 13, 1981.

CITITATIONS TO OPINION BELOW

Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia on April 13, 1981. The order of the Supreme Court of Georgia and the unreported opinion of the Superior Court of Butts County are set out in Appendices A and B respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

Discretionary review of the judgment of the Superior Court of Butts County was sought in the Supreme Court of Georgia pursuant to Ga. Code Ann. §24-4526. Review was denied April 13, 1981. Pursuant to Rule 20 of the Rules of the Supreme Court, the time for this Petition runs from the denial of review issued by the Supreme Court of Georgia on April 13, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia, the texts of which are set out in Appendix C hereto:

Georgia Code Ann. §24-4526
Georgia Code Ann. §26-1101
Georgia Code Ann. §38-801(d)
Georgia Code Ann. §50-127
Georgia Code Ann. §27-2534.1(b)(4)

QUESTION PRESENTED

Whether Petitioner was denied the effective assistance of counsel pre-trial, in the guilt/innocence phase of trial and at the sentencing phase of trial in a capital case where the sentence of death was imposed in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

HOW THE ISSUE WAS RAISED BELOW

Petitioner's state Petition for Writ of Habeas Corpus filed in the Superior Court of Butts County, Georgia, pursuant to Ga. Code Ann. §50-127 raised the constitutional issue of ineffective assistance of trial counsel. The habeas corpus court considered the merits of the issue and found against Petitioner. The constitutional issue was raised again on application for certificate of probable cause to appeal in the Supreme Court of Georgia which denied the application.

STATEMENT OF THE CASE

In January, 1976, Petitioner, Ronald Douthit was convicted of murder and sentenced to death in the Superior Court of Cobb County, Georgia. The judgment and sentence was affirmed by the Georgia Supreme Court in Douthit v. State, 239 Ga. 81, 235 S.E. 2d 493 (1977).

On June 19, 1978, Petitioner filed an extraordinary motion for new trial in the Superior Court of Cobb County; the motion was denied and the Georgia Supreme Court affirmed. Douthit v. State, 244 Ga. 471; 260 S.E. 2d 875 (1979). Certiorari was denied by this Court. Douthit v. Georgia, 445 U.S. 938 (1980).

On May 20, 1980, Petitioner filed a Petitioner for Writ for Habeas Corpus in the Superior Court of Butts County, Georgia. The petition was denied on November 14, 1980 (Appendix B); an application for certificate of probable cause to appeal was denied by the Georgia Supreme Court on April 13, 1981 (Appendix A).

On January 9, 1976, Petitioner, Ronald Douthit was indicted for the December 17, 1975 death of his first cousin, Leonard Frazier. Ronald Douthit and a cousin, Rodney Dulaney, were both charged with the crime.

The evidence at trial did not place Petitioner at the scene of the crime.[1] Rather, the prosecution was based on a

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1. Findings of Fact, Habeas Corpus Court (App. B at p. 8).

theory of conspiracy. The State suggested that Frazier had been murdered for insurance proceeds.

The State presented evidence at trial that on September 28, 1975, Petitioner had purchased a $15,000 policy on the life of Leonard Frazier with Frazier's father named as the beneficiary.[2]

Under the provisions of the policy, the premiums were to be paid monthly by automatic bank check from Petitioner's bank account at the C&S Bank; that is, the insurance company (Lincoln National Life) would automatically draw the money from Petitioner's bank account (T Trial 219, 326, 237, R Habeas Corpus 350, 456, 457; State's Trial Exhibit 22, R Habeas Corpus 588-620).

On November 22, 1975 someone, purporting to be Leonard Frazier, telephoned Jefferey Faircloth, the agent for the life insurance company and convinced Faircloth, without a personal meeting, to change the beneficiary of the life insurance policy from Frazier's father to the Petitioner, Ronald Douthit. Faircloth testified that he was familiar with Ronald Douthit's voice and that the person who called to effect the change of beneficiary was not Ronald Douthit (T. Trial 219-221, 229-230, R Habeas Corpus 350-352, 360-361).

On December 17, 1975, Leonard Frazier's body was found on the side of the Log Cabin Drive in Smyrna, Georgia. He had been shot three times by a .22 caliber firearm (T Trial 72, 104, 150, R Habeas Corpus 203, 234, 281).

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2. Frazier was employed at Petitioner's canine kennel; Petitioner had also purchased a major medical health insurance policy for Frazier (T Trial 216-217, R Habeas Corpus 347-348).

Later on December 17, 1975, Sgt. Doug Williams of the Cobb County, Georgia Police Department obtained a warrant for the search of Petitioner's residence.[3] The facts available to law enforcement authorities at the time the warrant was obtained were: the discovery of Leonard Frazier's body; the autopsy report showing the cause of death to be gunshot wounds; and statements by Leonard Frazier's brothers that Petitioner had obtained an insurance policy on the life of Leonard Frazier. Sgt. Williams also testified that he had received "information" (the informant was not named) that at some unspecified time in the past, Petitioner had threatened the life of Leonard Frazier (T Preliminary Hearing 5-14, R Habeas Corpus 883-892). No facts were given to show reason to believe that evidence of the crime could be found at Petitioner's residence.

Sgt. Williams and other members of the Cobb County Police Department executed the search of Petitioner's residence on December 17 (T Trial 283-284, R Habeas Corpus 414-415). Petitioner was not at home when the police arrived to conduct the search; however, Petitioner, Ronald Douthit, arrived while the police were searching his home and was arrested immediately upon his arrival (T Trial 288-290; 304-305, R Habeas Corpus 419-421; 434-435).

Pursuant to the search of Petitioner's residence, police officers seized a piece of screen with a red stain

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3. Petitioner's co-indictee, Rodney Dulaney, at that time, also lived at Petitioner's residence. (T Preliminary Hearing 14, R Habeas Corpus 892).

from the basement of the residence (T Trial 286-287, R Habeas Corpus 302-303); the red stain on the screen was found to contain human blood (T Trial 272-274, R Habeas Corpus 403-405). This screen was introduced against Petitioner at trial (State's Trial Exhibit No. 17).

Petitioner was questioned by police officers at his residence pursuant to the arrest. Petitioner allegedly made statements consistent with innocence, indicating that Rodney Dulaney was responsible for Frazier's death. However, according to the State's evidence, Petitioner admitted knowledge of the location of a .22 caliber pistol and led police officers to the location of this pistol and allegedly admitted knowledge of Rodney Dulaney moving the body. The statement and the weapon were introduced against Petitioner at his trial (T Trial 306-310, 334-336, R Habeas Corpus 436-440, 464-466; State's Trial Exhibit No. 12, R Habeas Corpus 542).

The State's evidence showed that Rodney Dulaney had possession of the murder weapon prior to the offense and had threatened other persons with the weapon (T Trial 180-181; 243, R Habeas Corpus 311-314; 373). No evidence was presented that indicated that Petitioner had possession of the weapon prior to the offense.[4]

The State further presented testimony of Roy Ursin of the Lincoln National Life Insurance Company. Mr. Ursin testified that the insurance policy on the life of Leonard Frazier with Ronald Douthit named as beneficiary was in effect

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4. Testimony at Rodney Dulaney's trial also indicated that after his arrest, Dulaney made telephone calls from the jail threatening State's witnesses (T Rodney Dulaney Trial 130-131 R Habeas Corpus 755-756). No such threats were made by Ronald Douthit.

on December 15, 1975, the date of Leonard Frazier's death. Mr. Ursin also testified concerning the automatic bank check provision for payment of the premiums (T Trial 318-326, R Habeas Corpus 448-456). See, p. 4, supra.

Petitioner's trial counsel made no motions to suppress either Petitioner's statements or evidence seized pursuant to the search of Petitioner's residence. Petitioner's trial counsel waived his right to make an opening statement to the jury at trial, then presented no evidence at either the guilt/innocence phase or the sentencing phase at trial.

Petitioner was convicted of murder and at the sentencing phase of the bifurcated trial was sentenced to death. The sole aggravating circumstance found by the jury in support of the death penalty was that the "offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value" Ga. Code Ann. §27-2534.1(b)(4). (T Trial 392-393, R Habeas Corpus 522-523).

Rodney Dulaney, tried separately, was convicted of murder and sentenced to life imprisonment. (R Habeas Corpus 67).

The State Habeas Corpus Proceeding

Petitioner's state habeas corpus proceeding in the Superior Court of Butts County, Georgia presented a vastly different perspective on the evidence in contrast to the perspective presented at trial.

The evidence presented at Petitioner's state habeas corpus proceeding included the testimony of Eugene Deal,

Petitioner's trial counsel[5], the testimony of George Darden, the District Attorney at Petitioner's trial, the testimony of Charles Norman, a former prosecuting attorney now in private practice and the testimony of Petitioner and his sister and grandmother. Petitioner also presented affidavits[6] of bank officials and seven (7) affidavits of persons who have known Petitioner all of his life and could have offered substantial evidence in mitigation of sentence at the penalty phase of Petitioner's trial.

At trial, the State's theory of motive for the death of Leonard Frazier was that Petitioner killed Frazier to collect the proceeds of the life insurance policy. The sole aggravating circumstance found by the jury in imposing the death penalty was that Petitioner killed Frazier for monetary gain. As George Darden, the District Attonrey who prosecuted Petitioner, testified at the state habeas corpus proceeding:

> "Q. [By Mr. Nursey]: You stated that the aggravating circumstance was that the murder was commited for pecuniary gain, is that correct?
>
> A. [By Mr. Darden]: That's correct.
>
> Q. So extremely relevant to that aggravating circumstance would be the validity of the insurance policy in this case would it not, and the knowledge of the person charged having -- of the validity of the insurance policy?
>
> A. Those would certainly be critical factors, yes, sir.
>
> * * * * * * *
>
> Q. And you considered that insurance policy an important part of your case, didn't you?

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5. The entire testimony of Petitioner's trial counsel given at the habeas corpus proceeding is attached to this Petition as Appendix D.

6. Affidavits are admissible as direct evidence in Georgia habeas corpus proceedings. Ga. Code Ann. §50-127(7)(c).

A. Certainly to show motive and scheme.

Q. You would have had a hard time showing motive without the insurance policy, don't you think?

A. I would have had difficulty without that, showing motive, yes, sir.

Q. So, Mr. Erson [Ursin] was a pretty key witness?

A. He was."

(R Habeas Corpus 72-73).

"State's witness, Roy Ursin, an employee of the Lincoln National Life Insurance Company, testified at trial that the insurance policy was in effect at the time of the murder. (T Trial 318-326). The insurance company later determined that the policy was not in effect at the time of the murder." (Finding of Fact, Habeas Corpus Court, Appendix B at p. 12). Mr. Ursin further testified that the premiums on the policy were paid by automatic bank check drawn on Petitioner's bank account, i.e., no independent action was required by Petitioner for the insurance company to monthly withdraw the premiums from his account. (T. Trial 318-326, R Habeas Corpus 448-456).

"Petitioner's trial counsel did not interview one of the key witnesses for the State, Roy Ursin, the secretary for Lincoln National Life Insurance Company." (Finding of Fact, State Habeas Corpus Court, Appendix B at p. 3). Because of his failure to interview Ursin, Petitioner's trial counsel was caught unprepared for the crucial testimony concerning the insurance policy:

"Q. [By Mr. Nursey]: You stated that you didn't interview Mr. Erson [Ursin] before he testified at the trial, is that correct?

A. [By Mr. Deal]: That's correct.

Q. The testimony that he gave took you by surprise, then, is that correct?

A. The part about how this insurance policy was paid for did, yes, sir."

(R Habeas Corpus 98, Appendix D at p. 21).

Had Petitioner's trial counsel prepared, evidence was readily available to show that the insurance policy was invalid on the date of Leonard Frazier's death and that Petitioner was aware of this fact. The State's key evidence of motive and sole evidence to prove the one aggravating circumstance found would have disappeared.

All of Petitioner's bank accounts were closed by November 24, 1975 (Petitioner's Habeas Corpus Exhibits No. 1 & 2, R Habeas Corpus 106-109); consequently, the premiums on the policy were not paid and, as was later acknowledged by the insurance company, the policy was invalid on the date of Frazier's death.

Petitioner was aware of this fact. The morning after his arrest (only one day after Frazier's death) at the first opportunity that he was afforded to speak with a member of his family, Ronald Douthit told his sister that his bank accounts were closed and asked her to verify this information. (R Habeas Corpus 22-23, 26-27)[7]. At his first meeting with his trial counsel, a few days later, Petitioner told counsel that the bank accounts had been closed. (R Habeas Corpus 91, Appendix D at p. 14).

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7. Petitioner was aware from police questioning that the police investigation focused on the life insurance policy (T Trial 335, R Habeas Corpus 465).

After being given this information, Petitioner's trial counsel did nothing to obtain the bank records to prove Petitioner's contentions:

> "Q. [By Mr. Nursey]: What month was the trial in 1976?
>
> A. [By Mr. Deal]: In January.
>
> Q. What part of January?
>
> A. The 27th and 28th.
>
> Q. So there was a little over a month between the first time you talked with Mr. Douthit and the trial, is that correct?
>
> A. That's correct.
>
> Q. And during that time you never got the records on his bank accounts?
>
> A. No, sir.
>
> Q. That is correct?
>
> A. That is correct. I did not get them."
>
> (R Habeas Corpus 91-92, Appendix D at pp. 14-15).

Incredibly even after Ursin's testimony, Petitioner's trial counsel failed to obtain the bank records:

> "Q. [By Mr. Nursey]: And if you had known before he [Ursin] was going to testify that he was going to testify to that [method of premium payment], what would you have done?
>
> A. [By Mr. Deal]: I would have had the bank records there.
>
> Q. And you would consider that properly representing Mr. Douthit, to bring in the bank records had you known Mr. Erson [Ursin] was going to say that?
>
> A. If I had known that's what he was going to testify to.
>
> Q. That would have been proper representation of Mr. Douthit to bring in those bank records?
>
> A. Sure it would.
>
> Q. Did you ask for a continuance after

Mr. Erson [Ursin] testified to prepare the bank records?

A. No sir, I didn't."

(R Habeas Corpus 98-99; Appendix D at pp. 21-22).

At Petitioner's trial, the State introduced evidence of statements allegedly made by Petitioner to police pursuant to his arrest at his residence; the State also introduced evidence, e.g., a pistol, seized as a result of statements allegedly made by Petitioner. (T Trial 306-310, 334-336, R Habeas Corpus 436-440, 464-466; State's Trial Exhibit No. 12, R Habeas Corpus 542).

At the habeas corpus proceeding, Petitioner presented the testimony of Charles Norman, a former prosecutor now in private practice in Marietta, Georgia (R Habeas Corpus 34). Charles Norman has never represented Ronald Douthit and has no interest in the outcome of this case (R Habeas Corpus 49). Norman testified concerning a conversation he had with Sgt. Doug Williams, the arresting officer in this case, and admissions made to him by Sgt. Williams.[8]

After Petitioner's trial, Sgt. Williams admitted to Charles Norman that during the questioning of Petitioner, and his co-indictee, Rodney Dulaney, police officers stripped bare an electric lamp cord, wrapped this cord around Rodney Dulaney, and threatened to plug the cord into a nearby electrical outlet

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8. Charles Norman appeared and testified voluntarily without subpoena; Sgt. Williams, a hostile witness, could not be subpoenaed to testify at the habeas corpus proceeding. Under Ga. Code Ann. §38-801(d), a witness must be tendered a witness fee of ten (10) dollars a day and mileage of twenty (20) cents per mile along with service of a subpoena. There is no exemption from this requirement for an indigent habeas corpus petitioner. E.g., Neal v. Smith, 226 Ga. 96, 172 S.E. 2d 684 (1970)

Petitioner moved the habeas corpus court for funds for witness and mileage fees; the motion was denied. Petitioner, therefore, could only call those witnesses who agreed to appear voluntarily, without subpoena. (R Habeas Corpus 2-3, 4, 37-38, 62-63).

if Dulaney did not talk. (R Habeas Corpus 48). This horrifying abuse took place in the presence of Petitioner and Petitioner agreed to talk only after witnessing the abuse (R Habeas Corpus 48).

Sgt. Williams made these admissions in a non-coercive atmosphere during lunch with Charles Norman (R Habeas Corpus 46-48). Sgt. Williams expressed a fear of testifying without immunity and was fearful of the police officers who would be implicated by his testimony. (R Habeas Corpus 50).

Petitioner's trial counsel filed no motions to suppress the statements of Petitioner or to suppress the fruits of the search of Petitioner's residence. In fact, trial counsel did not even request a Jackson v. Denno [378 U.S. 368(1964)] hearing prior to the introduction of the alleged statements at trial. (R Habeas Corpus 85; Appendix D at p. 8).

Incredibly, trial counsel decided not to file a motion to suppress without even seeing a copy of the search warrant (R Habeas Corpus 92; Appendix D at p. 15).

Trial counsel initially testified that he filed no motions to suppress because he felt that no damaging statements were made nor damaging evidence seized (R Habeas Corpus 85, 92; Appendix D at pp. 8, 15). Later, trial counsel admitted that such damaging statements and evidence were introduced by the State (R Habeas Corpus 93-94; Appendix D at pp. 16-17).

Trial counsel further testified that prior to trial, he was unaware of any physical abuse inflicted on Petitioner during police questioning (R Habeas Corpus 85-86; Appendix D at pp. 8-9). However, at Petitioner's preliminary hearing, one month prior to trial, trial counsel, in cross-examination

of Sgt. Williams, questioned Sgt. Williams concerning allegations of physical abuse of Petitioner (T Preliminary Hearing 52-53, R Habeas Corpus 930-931).

Petitioner's trial counsel presented absolutely no evidence on Petitioner's behalf during the penalty phase of the bifurcated capital trial. The only argument presented on Petitioner's "behalf" at the penalty phase was as follows:

> "MR DEAL: May it please the Court, ladies and gentlemen:
>
> You heard what Mr. Darden said about--you heard this police officer say that he had never--didn't know anything about any record this boy had. You must believe these people, with all the contradictions and all the testimony where they have admitted they lied, and if you convict a man with that, I am not going to stand up here, like Mr. Darden said, and beg for mercy. I am going to ask you to go out there and bring back a verdict for whatever your conscience will let you live with, and I thank you."
>
> (T Trial 385, R Habeas Corpus 515).

This one paragraph closing argument was given by trial counsel within minutes of the guilty verdict while counsel was emotionally upset and angry with the jury:

> "Q. [By Ms. Westmoreland]: Did you present any argument at the sentencing phase of the trial after the conviction?
>
> A. [By Mr. Deal]: My total argument at that time was that I had gotten a little upset with the jury coming back, and I told them -- my only argument was that they bring back whatever verdict they thought they could live with. Mr. Darden in his argument had argued to the jury that 'they're going to get up here and they're going to beg for mercy and they're going to do this and that and the other", and I said, 'No we won't beg for mercy. You just bring whatever verdict you think your conscience will allow you to live with'".
>
> (R Habeas Corpus 84; Appendix D at p. 7).

* * * * * * *

"Q. [By Mr. Nursey]: You said that the only argument you presented to the jury during the penalty phase was 'do what your conscience tells you is right.' Am I more or less paraphrasing correctly?"

A. [By Mr. Deal]: I just told them to bring back whatever verdict that their conscience would allow them to live with.

Q. And you said at that time you were pretty upset with the jury after returning the guilty verdict?

A. Right.

Q. Did you request any kind of continuance to prepare evidence for the penalty phase?

A. No, sir.

Q. Did you request any kind of recess or continuance for your emotions to cool down for a little while?

A. No, sir.

(R Habeas Corpus 98; Appendix D at p. 21

Petitioner's trial counsel made absolutely no preparation for the penalty phase of trial:

"Q. [By Mr. Nursey]: Mr. Deal, what evidence did you prepare for the penalty phase of this trial?

A. [By Mr. Deal]: I don't guess we prepared any because I didn't really think we were going to get that far, Mr. Nursey.

Q. You didn't think there would ever be a penalty phase?

A. No sir."

(R Habeas Corpus 96-97; Appendix D at pp. 19-20).

At the state Habeas Corpus proceeding, Petitioner presented the testimony of his grandmother and sister and the affidavits of seven (7) reputable members of the community who have known Petitioner all of his life to show that evidence of mitigation was available and could have been

presented at the penalty phase of trial (Petitioner's Habeas Corpus exhibits No. 3-10; R Habeas Corpus 110-129). Petitioner further presented testimony to show the ease with which the affiants were located and interviewed (R Habeas Corpus 31-33).

Among the evidence of mitigation demonstrated was the following: Petitioner, Ronald Douthit, was orphaned at a young age and was raised by his grandmother; that Ronald Douthit had never previously been arrested or in trouble with the law; that Ronald Douthit maintained gainful employment and supported his grandmother; that Ronald Douthit regularly attended and was active in the Baptist Church and drove his grandmother to Church every Sunday; that Ronald Douthit had a reputation for helping persons in his community, that he provided transportation to the grocery store and other places for elderly persons in his neighborhood; that Ronald Douthit loved to work with children and that he used to organize ballgames and other activities for the children in his neighborhood. (R Habeas Corpus 25-27, 29-30; Petitioner's Habeas Corpus Exhibits No. 3-10, R Habeas Corpus 110-129). None of the affiants were ever contacted by Petitioner's trial counsel (R Habeas Coprus 110, 113, 115, 117, 119, 122, 125, 129).

The State offered no evidence at the habeas corpus proceeding to attempt to rebut this evidence of mitigation.

REASONS FOR GRANTING THE WRIT

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, PRE-TRIAL, IN THE GUILT/INNOCENCE PHASE OF TRIAL, AND AT THE SENTENCING PHASE OF TRIAL IN A CAPITAL CASE WHERE THE SENTENCE OF DEATH WAS IMPOSED IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Pre-Trial

The pre-trial phase of a criminal defense is "perhaps the most critical period of the proceeding," a time when "consultation, thorough-going investigation and preparation are vitally important." Powell v. Alabama, 287 U.S. 45, 57 (1932); accord, e.g., Von Moltke v. Gillies, 332 U.S. 708 (1948).

Section 4.1 of the American Bar Association Standards Relating to the Prosecution Function and the Defense Function states:

> "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities..."

In this "most critical" phase, Petitioner's trial counsel's failings were numerous.

Trial counsel failed, pre-trial, to investigate the State's "insurance motive" theory. Had trial counsel conducted this investigation, his investigation would have revealed that the insurance policy was paid by automatic bank checks from Petitioner's bank account. This investigation would

have further revealed that the policy was invalid since Petitioner had closed his bank accounts. (See pp. 5, 10-12, supra).

Counsel was certainly on notice of these facts since he was informed of them by Petitiner at counsel's first meeting with Petitioner (R Habeas Corpus 91, Appendix D at p. 14). Had this adequate investigation been conducted, trial counsel could have refuted the State's theory of motive and eliminated the proof of the sole aggravating circumstance supporting the death sentence (See, pp. 9-10, supra).

Trial counsel failed to interview Roy Ursin, the State's key witness (R Habeas Corpus 72-73; 98, Appendix D at p. 21); thus, counsel was caught by surprise and was unprepared to rebut this crucial testimony which, subsequent to the trial, was determined to be erroneous.

Trial counsel failed to make any motion to suppress Petitioner's statements or evidence seized from Petitioner's residence despte the suspect circumstances of the arrest, interrogation and search and seizure (See, pp. 6-7, 8, 13-14, supra). Incredibly, trial counsel made his determination to file no motion to suppress evidence even though he had never even seen a copy of the search warrant upon which the search was based (R Habeas Corpus 92; Appendix D at p. 15). Counsel's sole justification for failing to file motions to suppress was that he felt that no damaging statements were obtained or damaging evidence seized; however, he later

admitted that such damaging statements and evidence were obtained (See, p. 14 supra).

Trial counsel failed to "explore all avenues leading to facts relevant to . . .penalty" (§4.1 ABA Standards). In fact, trial counsel failed to explore any avenues. For the critical sentencing determination, Mempha v. Rhay, 389 U.S. 128 (1967); Specht v. Patterson, 386 U.S. 605 (1967), trial counsel made no pre-trial preparation (R Habeas Corpus 97-98; Appendix D at pp. 20-21).

B. Trial

Trial counsel virtually defaulted the trial stage of Petitioner's case. From the beginning of the voir dire examination of the jury, trial counsel exhibited no more than a pro forma approach to the conduct of the trial.

The entire voir dire and jury selection process required only 57 pages of transcript (T Trial 1-57; R Habeas Corpus 133-188). Trial counsel asked only three or four general closed-ended questions of the prospective jurors.

Typical of a voir dire examination of a prospective juror was as follows:

> "Q. [By Mr. Deal]: Mr Garcia, have you or any member of your immediate family ever been the victim of a crime?
>
> A. [By Juror]: No, sir.
>
> Q. Do you know of any reason why you could not be competently [sic] impartial, should you be chosen as a juror in this case?
>
> A. No.
>
> Q. Would the fact my client is a black man have any bearing in your decision in this case?
>
> A. No.
>
> MR. DEAL: Nothing further."
>
> (T. Trial 12; R Habeas Corpus 144).

The purpose of voir dire is " . . . to determine whether the veniremen are qualified, whether they have prejudged the case, and whether their minds are free from prejudice or bias . . ." Kruether v. United States, 376 F. 2d 654, 656-657 (10th Cir. 1967). It is considered to be an ". . .integral, vital element of a fair trial." United States v. Woods, 364 F. 2d 481, 483 (3d Cir. 1966).

Counsel's "perfunctory approach to the important task of selecting an unbiased jury", Marzullo v. Maryland, 561 F. 2d 540, 547 (4th Cir. 1977), fell short of even the most minimal standard.

If trial counsel's approach to selection of the jury was merely pro forma, it was probably the high point of his performance at trial.

Trial counsel waived his right to make an opening statement on Petitioner's behalf (T Trial 60-61; R Habeas Corpus 191-192). Trial counsel presented no evidence on Petitioner's behalf although there was favorable evidence available, e.g., evidence that the life insurance policy was invalid on the date of the victim's death and that Petitioner was aware of this (See, pp. 11-12, supra).

Even after trial counsel was surprised by the testimony of Roy Ursin concerning the insurance policy (R Habeas Corpus 98, Appendix D at p. 21), counsel failed to obtain the bank records necessary to rebut the testimony (R Habeas Corpus 98-99, Appendix D at pp. 21-22). Later,

trial counsel admitted that proper representation of Petitioner required that he obtain the bank records (R Habeas Corpus 98-99, Appendix D at pp. 21-22). Tragically, Mr. Ursin's testimony concerning the validity of the policy, was later determined to be incorrect.

Although Petitioner literally begged trial counsel to allow him to testify in his own behalf, trial counsel refused (R Habeas Corpus 95-96, Appendix D at pp. 18-19).

Not one word of testimony was spoken nor one document introduced to rebut any of the State's case.

Trial counsel possesses a sincere belief in Petitioner's innocence (R Habeas Corpus 83; Appendix D at p. 6). However, his only effort at trial was to sit on this sincere belief and do nothing to actually represent Petitioner.

C. Penalty Stage

The quality of the representation afforded during the penalty phase of Petitioner's trial must be considered in light of this Court's holding "that in capital cases it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence." Gregg v. Georgia, 428 U.S. 153, 189 n. 38 (1976)(emphasis supplied).

This Court explained mimimum requirements for the fair determination of sentence in Woodson v. North Carolina, 428 U.S. 280, 304 (1976):

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> While the practice of individualizing sentencing determination generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendent [cite omitted] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of infliction the penalty of death."

See also, Lockett v. Ohio, 438 U.S. 586 (1978). The primary responsibility for insuring that these mitigating considerations are presented to the sentencing authority falls squarely upon defense counsel.

Even in misdemeanor cases, at sentencing, it is common for defendant's counsel to present to the court information concerning the defendant's background and character. This is so much more necessary in a capital case where life itself is at stake.

The ABA Standards on the Administration of Criminal Justice, Sentencing Alternatives and Procedures define the responsibilities of defense counsel in the sentencing procedure as follows:

Section 5.3 Duties of Counsel

> (e) The defense attorney should recognize that the sentencing stage is the time at which for many defendants the most important services of the entire proceeding can be performed.
> (f) The duties of the defense attorney with respect to each specific sentence should include the following steps: . . .
>
> (iii) The attorney should satisfy himself that the factual basis for the sentence will be both adequate and accurate, and that the record of the sentencing proceeding will accurately reflect relevant circumstances of the offense and characteristics of the defendant which were not disclosed during the guilt phase of the case . . .

Trial counsel for Petitioner testified that he did absolutely no preparation for the penalty stage (R Habeas Corpus 96-97, Appendix D at pp. 19-20). He did no investigation of Petitioner's background, he interviewed not one witness to present testimony in mitigation.

Trial counsel testified that his only attempt to place any mitigation in the record was his cross-examination of a police officer where the officer testified that he knew of no arrest record on Petitioner (R Habeas Corpus 84, 97; Appendix D at pp. 7, 20). However, trial counsel's recollection of the police officer's testimony is incorrect:

> "Q. [By Mr. Deal]: I believe you also stated that you had known Mr. Douthit here for about three years?
>
> A. [By Lt. Moss]: Yes sir, that's correct. Maybe a little bit longer.
>
> Q. Do you know whether or not, during the course of your examination or prior thereto when you first met him, from there on up until now, have you investigated as to whether or not he has any type of record?

A. No, sir; I have never checked any record on him.

Q. Do you know of him ever being arrested before for anything?

A. No, sir; I do not know it.

Q. You have been employed here with the County Police Force for all this period of time that you have known him, have you not?

A. Yes, sir, I have.

Q. If he had had one would you have known about it?

THE COURT: Mr. Deal, there are certain statutory questions that you are confined to.

MR. DEAL: I am through with this witness."

(T Trial 314, R Habeas Corpus 444).

The state habeas corpus court found as follows:

"Petitioner complains that his trial counsel did not prepare for and did not render reasonably effective assistance during the sentencing phase of the trial. It is true that trial counsel offered no evidence and that his argument was extremely abbreviated. He was surprised by the guilty verdict and somewhat overcome. His reaction to a situation he had not anticipated was to do nothing, or at least very little."

Conclusions of Law, State Habeas Corpus Court, Appendix B at p. 6. (emphasis supplied)

Although prejudice need not be shown, for when an attorney does nothing "the degree of prejudice can never be known" Hamilton v. Alabama, 368 U.S. 52, 55 (1961), substantial prejudice can be shown in this case. At the state habeas corpus proceeding, Petitioner made a showing of substantial evidence of mitigation which easily could have been presented at the penalty stage (see, pp. 16-17, supra).

There are several indications in the record that the jury's decision on life and death was close: 1) the District Attorney testified that he was surprised that the jury imposed the death sentence in this case (R Habeas Corpus 72); 2) during it deliberations, the jury returned to question the court concerning the procedure for granting "mercy" (T Trial 389, R Habeas Corpus 519); 3) the jury was divided on the issue of punishment for an extended period of time (T Trial 390, R Habeas Corpus 520); 4) the jury rejected two of the three aggravating circumstances urged by the State (T Trial 392-393; R Habeas Corpus 522-523).

The slightest bit of evidence may very well have tipped the scales in favor of life. In this case, there wasn't even a grandmother's tear in evidence asking that Ronald Douthit's life be spared.

CONCLUSION

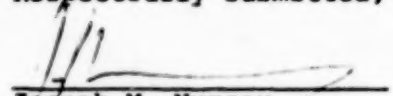
In 1932, this Court in Powell v. Alabama, supra, held that a person on trial for his life, at a minimum, has the right to be represented by counsel. In this Petition, this Court is confronted with a situation where at a critical stage of the proceedings, a stage where Petitioner's very life was at stake, his trial counsel did nothing.

Trial counsel testified that he did nothing; the Georgia state courts have found that he did nothing.

Before Ronald Douthit is sent to his death, shouldn't he have a trial where he is represented by an attorney? In 1981, forty-nine years after Powell, the state courts of Georgia have answered this question, "No".

WHEREFORE, for the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of Butts County, Georgia.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing party, Ms. Mary Beth Westmoreland, Assistant Attorney General, 132 State Judicial Bldg., 40 Capitol Square, Atlanta, Georgia 30334; with a copy of the foregoing Petition for Writ of Certiorari and the Appendix thereto by placing same in the United States Mail with adequate first-class postage attached.

This 8th day of July, 1981.

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